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No. 94-1723

In the Supreme Court of the United States

OCTOBER TERM, 1994

JERRY WARTSKI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners waived their right to challenge the seizure of their property without notice and a hearing by failing to raise that claim until after the district court entered a judgment forfeiting that property.

2. Whether petitioners' burden to show that they did not consent, within the meaning of 21 U.S.C. 881(a)(7), to the illegal acts occurring on their property required them to establish that they had taken all reasonable steps to prevent the illegal use of that property.

3. Whether the forfeiture of petitioners' single-room-occupancy apartment hotel constituted an excessive fine, in violation of the Eighth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the judgment is noted at 47 F.3d 1159 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1995. The petition for a writ of certiorari was filed on April 20, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, the United States District Court for the Southern District of New York entered an order forfeiting, under 21 U.S.C. 881(a)(7), a build-

ing owned by petitioners. The court of appeals affirmed. Pet. App. 1a-6a.

1. Petitioners are the individual and corporate owners of a ten-story, 215-unit, single-room-occupancy apartment hotel (the building) in the Washington Heights section of Manhattan, New York. Between October 1988 and May 1991, the New York City Police Department (NYPD) conducted 23 separate searches of apartments within the building. During those searches, NYPD officers seized at least 37 pounds of cocaine in 30 different apartments, and also seized scales, drug paraphernalia, guns, and cash. In the course of those searches, the police also arrested 55 people for narcotics offenses. Gov't C.A. Br. 3, 4-5. In May 1991, searches were conducted on five different floors of the building, and yielded 11 pounds of cocaine, three firearms, and $31,000 in cash. After each of those searches, a letter was sent to petitioners describing the results of the search. Gov't C.A. Br. 5-6.

On June 12, 1991, an Assistant District Attorney from the New York County District Attorney's office and a New York City Police lieutenant met with petitioner Alan Wartski, the managing partner of petitioner 560 Realty Corporation, and with Harold Rivenburgh, the executive manager of the building. The officials informed Wartski and Rivenburgh of the incidence of drug activity in the building and suggested that they improve their means of screening tenants, and that they contact the police with any information about drug activity in the building.[1]

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[1] Petitioners' records indicated that few tenant files even contained an application for tenancy; that more than 80% of those files had no documentation verifying employment; and

Gov't C.A. Br. 6. After that meeting, police observed additional narcotics-related activity in the building, and additional searches of apartments within the building between June 1991 and November 1991 netted more than six pounds of cocaine, scales, drug records, cash, and a loaded handgun. Gov't C.A. Br. 7-9.

On November 27, 1991, New York City officials met with petitioners and Rivenburgh. At that meeting, the officials again suggested a number of ways to eradicate the drug problem in the building, including requiring that tenants wear photographic identification, hiring 24-hour security guards, and improving the screening of applicants for tenancy. Gov't C.A. Br. 10. Petitioners instead suggested that the police aid them in "locking out" tenants, but the city officials rejected that proposal on the ground that it might be illegal. The city officials also declined petitioners' request that an NYPD officer be stationed full time in the building at petitioners' expense, on the grounds that the officer would effectively be serving as a private security guard and that acceding to that request could obligate the NYPD to provide similar service to all landlords who had a drug problem in their buildings. The officials did, however, supply petitioners with the name of a private guard service. Gov't C.A. Br. 10-11.

After that meeting, petitioners sent New York officials a proposed "contract," in which petitioners would have agreed to lock out illegal subtenants, to require visitors between 6:00 p.m. and midnight to sign in and be admitted by a legal tenant, to seal any apartment in which an arrest or seizure was made for

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that the applications that had been received were often undated or unchecked by petitioners. Gov't C.A. Br. 7.

at least 60 days, and to report any suspected drug activity to the police, and in which the officials would have agreed, *inter alia*, to forgo taking legal action against the building. In a letter response, an assistant district attorney informed petitioners that the proposed visitors policy would be inadequate because drug activity occurred at all hours of the day and night and that it would be illegal to lock out any tenant who had lived in an apartment 30 days or more. The assistant district attorney also informed petitioners that a written agreement with the city was unnecessary and that petitioners were free to take selected action on their own to eliminate the drug problem in the building. Gov't C.A. Br. 12-13. In their response to that letter, however, petitioners again conditioned their willingness to take remedial steps on a written agreement with the district attorney's office. Petitioners made no further effort to contact the District Attorney's office or the two police officers responsible for the investigation of drug trafficking at the building. Gov't C.A. Br. 13.

On December 11, 1991, NYPD officers searched apartment 5A2 of the building, which was assigned to the building's manager, who was also its managing agent. During the search officers found .9mm ammunition, and a police dog detected a strong scent of narcotics on the floor of the apartment. After that search, an NYPD sergeant informed Rivenburgh and petitioner Alan Wartski of his concern that the building manager might be involved in drug trafficking and that the matter warranted investigation. Between February and April, seven more searches of apartments in the building yielded additional cocaine, scales, paraphernalia, drug records, and $4,000 cash. Gov't C.A. Br. 14.

Between April and September 1992, the NYPD conducted an undercover investigation of a cocaine trafficking organization operated out of the building by Euclides Lantigua. In May and June 1992, undercover officers made two purchases of cocaine from a Lantigua associate in an apartment in the building. On August 5, 1992, officers seized 22 pounds of cocaine from Lantigua's apartment and arrested three of Lantigua's associates; on September 16, 1992, officers searched three apartments used by Lantigua's organization, seized paraphernalia, drug records, and $13,000 cash, and arrested three more of Lantigua's associates and Lantigua himself. The evidence obtained in the undercover investigation showed that Lantigua controlled as many as ten rooms in the building, and that the building manager not only knew of Lantigua's drug business, but had permitted one of Lantigua's associates to rent two apartments under a false name. Gov't C.A. Br. 15-16.

2. On October 22, 1992, the government filed a verified complaint under seal seeking forfeiture of the building under 21 U.S.C. 881(a)(7), which provides for the forfeiture of property used or intended to be used in the commission of a felony drug offense. On the same day, a federal district judge issued an ex parte seizure warrant for the building. The court found probable cause to believe both that the building was subject to forfeiture and that exigent circumstances justified the seizure of the building without prior notice. Gov't C.A. Br. 17-18. On October 23, 1992, the United States Marshals Service seized the building. Gov't C.A. Br. 18. At the time of the seizure, the NYPD executed search warrants in 17 apartments and seized a total of five pounds of cocaine, one loaded weapon, scales, paraphernalia, and $2,000 cash. Gov't

C.A. Br. 18-19. Petitioner 560 Realty Corporation filed a claim to the building and an answer to the complaint. Neither that claim nor the answer, however, challenged the propriety of the pre-notice seizure or the forfeiture of the entire building. Gov't C.A. Br. 19.

3. At trial, petitioners stipulated that the government had probable cause to obtain forfeiture of the building. Petitioners defended against the forfeiture on the ground that they were innocent owners because they had not consented to the drug activity that occurred in the building. The district court instructed the jury that to find that petitioners did not consent to the illegal activity, it must find that petitioners had done all that reasonably could be expected of them under the circumstances. Gov't C.A. Br. 19-20. The jury found the building subject to forfeiture. Gov't C.A. Br. 20.

After the entry of judgment, petitioners filed a motion for judgment notwithstanding the verdict and for a new trial, alleging, for the first time, that the seizure of the building had violated their rights under the Due Process Clause and that the forfeiture had constituted an excessive fine under the Eighth Amendment. Gov't C.A. Br. 20-21. The district court denied the motions. The court noted that petitioners had failed to move for a directed verdict at the close of the evidence, which is a prerequisite to moving for a judgment n.o.v. Pet. App. 7a-8a; Gov't C.A. Br. 21.

4. The court of appeals affirmed. Pet. App. 1a-6a. The court held that, by failing to raise their claims under the Due Process Clause until after the jury's verdict, petitioners had waived any claim that the seizure of the building without prior notice or adversarial hearing was unconstitutional. The court

of appeals declined to excuse petitioners' failure to raise the issue of pre-seizure notice before trial on the ground that *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993), which held that the Due Process Clause ordinarily requires pre-seizure notice, had not been decided until after trial in this case. The court noted that "even before the Supreme Court's ruling in *James Daniel Good*, the rule in this Circuit was that, absent exigent circumstances, seizure without notice violates the due process rights of an owner." Pet. App. 3a. In any event, the court of appeals held, "exigent circumstances were present and shown," because the widespread and ongoing drug-related activity in front of the building and in the building's common areas "presented a danger to the community." *Id.* at 3a-4a.

The court of appeals also rejected petitioners' claim that the district court should have instructed the jury that, if it found that petitioners had taken reasonable steps to prevent the illegal use of their property, petitioners had not "consented" to that activity. The court held that the proposed instruction was inconsistent with Second Circuit precedent, which permitted a property owner to establish that he did not "consent" to illegal activity within his building only if he had "take[n] every reasonable step, and do[ne] all that can reasonably be done, to prevent the illegal activity." Pet. App. 4a-5a.

Finally, the court held that the forfeiture of the building did not violate the Excessive Fines Clause of the Eighth Amendment. Pet. App. 5a-6a. The court declined to adopt a standard for assessing the point at which a forfeiture violates the Excessive Fines Clause because it found that "wherever such a line could be drawn, this forfeiture would be proper." *Id.*

at 5a (quoting *United States* v. *38 Whalers Cove Drive*, 954 F.2d 29, 39 (2d Cir.), cert. denied, 113 S. Ct. 55 (1992)).

ARGUMENT

1. Petitioners contend (Pet. 12-19) that the court of appeals erred in rejecting their post-trial claim that the absence of notice and an adversary hearing before the seizure of their property violated their due process rights. The court of appeals correctly held that petitioners waived that claim by failing to assert it in a timely manner in the district court.

In *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 505 (1993), this Court held that, "[u]nless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture." The Court further held that "[t]o establish exigent circumstances, the Government must show that less restrictive measures * * * would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property." *Ibid.*

The courts below correctly rejected petitioners' challenge to the absence of pre-seizure notice and a hearing on the ground that petitioners—unlike the property owner in *James Daniel Good*—failed to challenge that aspect of the seizure before the jury's verdict and accordingly waived their right to do so. Federal Rule of Civil Procedure 8(c) provides that a party, in a responsive pleading, "shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmative defense." See also Fed. R. Civ. P. 12(b) ("Every defense, in law or fact, to a claim

for relief in any pleading * * * shall be asserted in the responsive pleading thereto."). An "affirmative defense" includes "[a]ny matter that does not tend to controvert the opposing party's prima facie case as determined by the applicable substantive law." 2A J. Moore, *Moore's Federal Practice* ¶ 8.27[3] (2d ed. 1995). In light of the "mandatory language" of Rule 8(c), "a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation." *Doubleday & Co.* v. *Curtis*, 763 F.2d 495, 503 (2d Cir.), cert. dismissed, 474 U.S. 912 (1985). See also C. Wright & A. Miller, *Federal Practice & Procedure* § 1278, at 477 (2d ed. 1990) ("Generally, a failure to plead an affirmative defense results in waiver of that defense and its exclusion from the case."). Petitioners' challenge to the absence of pre-seizure notice and a hearing is an affirmative defense within the meaning of Rules 8(c) and 12, because it did not controvert the merits of the government's request for forfeiture, but instead requested dismissal for failure to comply with pre-seizure procedural requirements. As the court of appeals observed (Pet. App. 22-32), petitioners' failure to raise that issue until after the district court had entered its judgment precluded petitioner from raising it on appeal, and petitioners supply no authority to the contrary.

Petitioners claim (Pet. 17) that the court of appeals' reliance on their waiver was misplaced because no "further evidentiary record" would have been necessary for the courts below to determine whether their rights under the Due Process Clause had been violated. That claim fails because, although courts of appeals may consider purely legal arguments that a party did not raise in a timely fashion, see *United States* v. *Strahl*, 958 F.2d 980, 983 (10th Cir. 1992);

United States v. *Barnett*, 935 F.2d 178, 180 (9th Cir. 1991), a decision to entertain a new argument is purely discretionary. Because petitioners' argument took the form of an affirmative defense, which Rules 8(c) and 12(b) expressly require will be raised before trial, the court of appeals' refusal to consider petitioners' untimely argument was a reasonable exercise of discretion.[2]

Petitioners also contend (Pet. 17-18) that their failure to raise their due process claim was justified because this Court did not announce its decision in *James Daniel Good* until four days after the district court entered the forfeiture judgment against the building. For several years, however, the courts of appeals had been in conflict on the issue that was resolved in *James Daniel Good*; moreover, this Court granted certiorari in *James Daniel Good* in March 1993, eight months before the trial in this case. Thus, petitioners were on notice, before trial, that the absence of pre-seizure notice and a hearing was a potential affirmative defense.[3] Cf. *Reed* v. *Ross*, 468

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[2] Petitioners also challenge (Pet. 15-17) the court of appeals' alternative holding (Pet. App. 3a-4a) that the government had demonstrated that exigent circumstances justified dispensing with the ordinary requirements of pre-seizure notice and a hearing. Petitioners do not, however, seek review of that holding, and they have not asserted that the application below of the exigent circumstances exception conflicts with any other reported decision.

[3] Before this Court's decision in *James Daniel Good*, the Second Circuit had required the government to give pre-seizure notice when it seized residential property, see *United States* v. *4492 S. Livonia Road*, 889 F.2d 1258, 1262-1265 (1989), but not when it seized commercial property, see *United States* v. *141st Street Corp.*, 911 F.2d 870, 874-876 (1990), cert. denied,

U.S. 1, 13, 14-15 (1984) (claim is not so "novel" as to justify failure to raise it on direct appeal unless it is one as to which counsel has "no reasonable basis upon which to formulate" a legal objection).

Petitioners also claim (Pet. 13, 18) that the decision below conflicts with the decisions in *United States* v. *9638 Chicago Heights*, 27 F.3d 327 (8th Cir. 1994), and *United States* v. *2130 W. Harbor Drive*, 48 F.3d 289 (8th Cir. 1995). In both of those cases, the Eighth Circuit, relying on *James Daniel Good*, directed a district court to dismiss a forfeiture complaint because the government had not provided the claimants with pre-seizure notice and a hearing. In *2130 W. Harbor Drive*, however, the claimant had preserved his Due Process claim in the district court by arguing in a pretrial motion to dismiss that he had been denied procedural due process because he had not received a pre-seizure hearing. See 48 F.3d at 291. And in *9638 Chicago Heights*, the court of appeals did not address any claim of waiver on appeal. The

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498 U.S. 1109 (1991). Although the decision in *141st Street Corp.* would have foreclosed a claim that the lack of pre-seizure notice and a hearing violated the Due Process Clause, petitioners offer no explanation of why they failed to preserve that issue while *James Daniel Good* was pending in this Court. Moreover, the futility of raising a claim does not ordinarily excuse a party from preserving a defense or objection. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 130 (1982) ("the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial"). Indeed, petitioners made a timely objection to the district court's jury instructions so as to preserve their claim of "consent" within the meaning of 21 U.S.C. 881(a)(7), see pp. 13-15, *infra*, despite the fact that Second Circuit law had squarely precluded their argument on that point.

decision in this case therefore conflicts with neither Eighth Circuit decision.[4]

In any event, the question presented by petitioners (Pet. i) has already been answered by this Court in *James Daniel Good*: Even if petitioners had properly preserved their claim under the Due Process Clause, this case would present at most a question of whether the seizure in this case was valid under that decision. Thus, this case presents no question of continuing importance.

2. Petitioners next claim (Pet. 20-25) that the district court erred in instructing the jury that, for petitioners to establish a defense of non-consent, they must show that they took "*all* reasonable steps to prevent the illegal drug use of their premises." Pet. 21. The court of appeals' decision upholding that

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[4] Petitioners also suggest (Pet. 14 n.5) that the decision below conflicts with *United States* v. *20832 Big Rock Drive*, 51 F.3d 1402, 1406 (9th Cir. 1995), which held that, where the government has violated the Due Process Clause by failing to provide a property owner with pre-seizure notice and a hearing, the remedy is not dismissal of the forfeiture action but, instead, suppression of evidence traceable to the unlawful seizure. That case does not assist petitioners, however, because petitioners failed properly to challenge the admission of such evidence in this case. See Pet. App. 4a (because petitioners "waived their objection to the introduction of the evidence" obtained as a result of the property seizure, the district court did not err in admitting that evidence). Because the court of appeals did not address—let alone base its decision upon—the issue of what remedy exists in a forfeiture action for impermissibly seizing property without notice and a hearing, its decision does not conflict with the Ninth Circuit's decision in *20832 Big Rock Drive*. Notably, unlike petitioners, the claimant in *20832 Big Rock Drive* raised his due process claim in a pretrial motion.

instruction was correct, and it conflicts with no other court of appeals decision. Review is therefore not warranted.

Section 881(a)(7) provides for the civil forfeiture of any real property used to commit a controlled substance offense. 21 U.S.C. 881(a)(7). The statute, however, contains an exception for property otherwise subject to forfeiture where the owner can show that the act or acts giving rise to the forfeiture were "committed * * * without [his] knowledge or consent." In *United States* v. *141st Street Corp.*, 911 F.2d 870, 878-880 (1990), cert. denied, 498 U.S. 1109 (1991), the Second Circuit adopted a definition of consent under the statute that was based on this Court's decision in *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). In *Calero-Toledo*, this Court suggested that forfeiture of an innocent owner's property might be unconstitutional if the owner "had done all that reasonably could be expected to prevent the proscribed use of his property." *Ibid.* The Second Circuit drew on that statement in defining "consent" under Section 881(a)(7), reasoning that the *Calero-Toledo* formulation "provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner." *141st Street Corp.*, 911 F.2d at 879. The court of appeals in this case relied on its earlier decision in *141st Street Corp.* when it rejected petitioners' claim that the district court's instruction had been erroneous.

Petitioners contend (Pet. 20, 22-23) that the court of appeals' definition of consent conflicts with this Court's statement in *Austin* v. *United States*, 113 S. Ct. 2801, 2811 (1993), that "[t]he inclusion of innocent-

owner defenses in [the forfeiture statute] reveals a * * * congressional intent to punish only those involved in drug trafficking." But *Austin* did not construe the text of the innocent-owner provision. Rather, it considered the separate question of whether the Excessive Fines Clause of the Eighth Amendment applies to civil forfeitures. The Court's observation in *Austin* regarding the innocent-owner provision formed part of its reasoning in holding that, under the statute, a forfeiture is "properly considered punishment" and hence subject to the Excessive Fines Clause. *Id.* at 2810. The decision in *Austin* does not suggest that the government is categorically precluded from obtaining forfeiture of property where the owner of the property did not himself commit the drug crimes that occurred on the property. On the contrary, Section 881(a)(7) textually requires forfeiture of real property used in felony drug offenses, except where the property owner establishes that those offenses occurred without the "knowledge or consent" of the owner.

Petitioners also assert (Pet. 20-21) that the decision below conflicts with *United States* v. *Lots 12, 13, 14 and 15, Keeton Heights Subdivision*, 869 F.2d 942 (6th Cir. 1989). Petitioners rely on the statement in that case that Section 881(a)(7) "imposes no requirement that a person who claims the status of an 'innocent owner' establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property," because "[i]t is enough, under the statute, that the owner establish that his proscribed act was committed 'without the knowledge or consent of that owner.'" 869 F.2d at 947. There is, however, no actual conflict between that case and this case, because the Sixth Circuit did

not address the issue of whether a judge may properly use the *Calero-Toledo* formulation to elucidate the meaning of "consent" under the statute. The Sixth Circuit's holding was simply that summary judgment was not appropriate for the government, because the property owner had properly preserved her innocent owner defense for trial. See *id.* at 948 ("It remains to be seen, of course, whether Mrs. Allen will be able to establish that her [cocaine-dealing] husband was in fact acting without her knowledge or consent. She, not the government, will have the burden of proof on that issue.").[5]

3. Finally, relying on *Austin* v. *United States*, petitioners argue (Pet. 26-30) that the forfeiture of the building constituted an excessive fine, in violation of the Eighth Amendment. In particular, petitioners assert (Pet. 30) that the forfeiture of the entire building is disproportionate to the amount of illegal activity that occurred there.

In *Austin*, this Court held that the Excessive Fines Clause applies to civil in rem forfeitures under 21 U.S.C. 881 (1988 & Supp. V 1993), because the protection of the Clause is not limited to criminal proceedings and the civil forfeiture at issue was punitive in effect. 113 S. Ct. at 2806-2812. The Court

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[5] Petitioners also assert (Pet. 21 (citations omitted)) that "the Second Circuit * * * disagrees with the Third and Ninth Circuits as to whether, in order to establish statutory innocent ownership, a claimant must show both lack of knowledge and lack of consent, * * * or whether a showing of lack of consent is sufficient." Whatever the merits of that claim, the asserted conflict is not presented in this case, because petitioners have conceded that they knew of the narcotics trafficking at the building, and the sole question therefore is whether they had demonstrated their lack of consent.

in *Austin*, however, expressly declined to adopt a test for determining whether a forfeiture is constitutionally "excessive," leaving that issue for initial exploration by the lower courts. *Id.* at 2812. The Court stated that it would not "rule out the possibility that the connection between the property and the offense may be relevant" to the determination of excessiveness, but emphasized that its decision did not preclude the lower courts "from considering other factors" that might also be germane to that inquiry. *Id.* at 2812 n.15. In a concurring opinion, Justice Scalia suggested that the sole measure of an in rem forfeiture's excessiveness is whether the property was "properly * * * regarded as an instrumentality of the offense"—in other words, "*whether* the confiscated property has a close enough relationship to the offense." *Id.* at 2815.

Since *Austin*, the courts of appeals have had few occasions to consider the appropriate measure of excessiveness under the Constitution. The one circuit to do so, the Fourth Circuit, has drawn upon Justice Scalia's concurrence in *Austin* and adopted a three-part test to determine whether the property at issue was an "instrumentality in the commission of the offense." See *United States* v. *Chandler*, 36 F.3d 358, 365 (4th Cir. 1994), cert. denied, 115 S. Ct. 1792 (1995). Two other courts have, in dicta, expressed dissatisfaction with exclusive reliance on the relationship between the property and the offense and have urged that other factors be taken into account. See *United States* v. *9638 Chicago Heights*, 27 F.3d 327, 330-331 (8th Cir. 1994); *United States* v. *Premises Known as RR No. 1*, 14 F.3d 864, 873 (3d Cir. 1994). Neither court, however, has announced a definitive test of its own, nor have any other courts of appeals

done so. Because the courts of appeals have not had sufficient opportunity to develop standards for evaluating claims of excessiveness, it is premature for this Court to grant certiorari to consider that issue.

In any event, this case does not present an appropriate vehicle for considering the excessive fines issue, because, as the court of appeals held (Pet. App. 5a), the forfeiture of petitioners' building was not excessive under any conceivable standard. Under an inquiry into whether the building was an "instrumentality" of the offenses in question, forfeiture was clearly appropriate, because the building was repeatedly used as the site of large-scale drug offenses. The evidence at trial established that during a four-year period, cocaine, weapons, scales, paraphernalia, and cash were repeatedly seized from the building. Indeed, the evidence established that approximately 70 of the 215 single rooms in the building, located on all floors, had been either the site of drug related searches, seizures, and arrests, or had been rented to drug dealers. Police officers also made seizures and arrests in common areas of the building, including the lobby and hallways.

Likewise, under a "proportionality" analysis, forfeiture of the building was proper. As we have noted, the evidence showed that the building's executive manager not only knowingly rented blocks of rooms to drug dealers, but was also apparently involved in drug dealing himself. Moreover, the jury was instructed that it could not find in favor of the government if it found that petitioners had done everything that they reasonably could have to curtail the drug trafficking. The jury's verdict was supported by the trial record, which demonstrated peti-

tioners' unwillingness—despite the repeated admonitions of local officials—to take action to prevent drug trafficking in the building.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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